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No. 79-2030

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT L. BOSTICK, ET AL., PETITIONERS

v.

DANIEL J. BOORSTIN,
AS THE LIBRARIAN FOR THE LIBRARY OF CONGRESS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court was clearly erroneous in finding that the Library of Congress refused to reclassify petitioner Bostick's position because of Civil Service Commission constraints and not because of racial animus.

2. Whether the district court abused its discretion in refusing to certify a class.

*The petitioners not named in the caption of the case are the members of the class that petitioner Robert L. Bostick sought to represent. See page 3, *infra*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 45a-51a) is reported at 617 F. 2d 875. The opinion of the district court (Pet. App. 26a-44a) is not reported.

The initial opinion of the district court (Pet. App. 1a-9a) is not officially reported, but appears *sub nom. Williams* v. *Mumford*, 6 Empl. Prac. Dec. (CCH) para. 8785. The initial opinion of the court of appeals (Pet. App. 10a-24a) is reported at 511 F. 2d 363, and this Court's denial of certiorari is reported at 423 U.S. 828.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1980. A petition for rehearing and suggestion of rehearing en banc was denied on March 24, 1980. The petition for a writ of certiorari was filed on June 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Robert L. Bostick, who is black, is a GS-13 visual information specialist at the Library of Congress. He seeks review of the court of appeals' unanimous affirmance of the district court's finding that the Library's refusal to reclassify his position at the GS-15 level was not due to discrimination on the basis of race, in violation of Title VII of the Civil Rights Act, 42 U.S.C. 2000e-16. He also seeks review of the court of appeals' finding that "there is no basis for overturning the exercise of the District Court's discretion in failing to make a class certification." Pet. App. 45a-46a n.1.

1. The undisputed historical facts were summarized by the court of appeals as follows (Pet. App. 46a-47a; footnotes omitted):

"[Petitioner] began working at the Library of Congress in 1947 as a graphic information specialist at grade GS-11. Beginning in September 1952, he sought a reclassification of his position to a GS-12. These efforts were repeatedly supported by his superiors in the Library, but the Civil Service Commission for several years refused to grant its approval, ruling that the position was correctly classified. Eventually, in December 1958, the Commission relented, and [petitioner's] position was changed to a GS-12. In February 1961, [petitioner] began a campaign to have the same position upgraded to a GS-13. Although that request was denied by a classification office in the Library of Congress, the Library's Assistant Director of Personnel decided to reclassify the position on the basis of an 'incumbency reallocation.'[1] [Petitioner] received his promotion to a GS-13 in April 1965.

"In April 1971, [petitioner] began his efforts to have his position reclassified to a GS-15. A review of his duties and responsibilities was conducted by James Lee, a [black] Position Classification Officer, who reached the conclusion that the position was properly rated as a GS-13, and that Civil Service Commission standards accurately described the work [petitioner] in fact performed. Nevertheless, the Library proceeded to request the Civil Service Commission to render an advisory opinion concerning the proper grade for [petitioner's] position. The Commission responded that there was no basis for classifying the job above GS-13, and the Library accordingly made its decision not to effect a further reclassification. Although a review process was apparently available, [petitioner] did not avail himself of the

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[1] "An incumbency reallocation is the reclassification of a position at a higher than normal level because of the strengths the incumbent brings to the particular job" (Pet. App. 47a n.4).

opportunity it provided but instead filed an administrative discrimination complaint. An equal opportunity counselor and the agency's Equal Opportunity Officer determined after investigation that [petitioner's] complaint was more appropriately regarded as a classification matter in the classification office and took no action. This suit in the District Court followed."

2. Petitioner Bostick and Joslyn Williams instituted this Title VII suit in the district court on their own behalf and on behalf of all black persons who were then employed by the Library, all black persons who were employed by the Library at any time after 1960 but who were no longer employed there, and all black persons who unsuccessfully sought employment with the Library at any time after 1960 (Pet. App. 2a, 11a).

The complaint included class action charges of racially discriminatory practices at the Library relating to recruitment, hiring, promotion, job classification, and firing (Pet. App. 2a).

The district court denied the motion to certify the suit as a class action and ordered the individual claims of Williams and petitioner Bostick severed (Pet. App. 1a-9a). After noting that petitioner Bostick "is employed in a unique capacity, one given to classification dispute" and that Williams "admitted to making false statements on his original application for employment," the court held, *inter alia*, that "[e]ach of their claims of discrimination is unique," and that their claims therefore "lack the typicalness of the claims of the class that is needed to make them proper class representatives" (Pet. App. 3a-4a).

An immediate appeal was taken from the order denying class certification, but the court of appeals held that it had no jurisdiction to entertain the appeal under 28 U.S.C. 1291 or 28 U.S.C. 1292(a)(1) (Pet. App. 10a-25a). This Court denied a petition for a writ of certiorari. 423 U.S. 828.

3. Following a trial, the district court held that petitioner Bostick failed to establish racial discrimination in the Library's refusal to reclassify his position. The court found that the statistical evidence presented by both parties was inconclusive (Pet. App. 38a-39a, 42a). However, even assuming the statistical evidence established a prima facie case of discrimination, the court ruled that Bostick could not prevail (Pet. App. 42a-43a):

> Assuming that the statistical and expert testimony that black employees at the Library have fared less well than other employees makes out a *prima facie* case, Bostick still could not have prevailed on his claim. The Library has satisfied the Court that the determination not to reclassify Bostick's position to GS-15 resulted from the fact that Bostick's position was believed to be—and was—properly classified under the CSC position classification standards at grade GS-13. Racial discrimination did not enter into that decision.

The court added "that Bostick's supervisors did not in any way de-emphasize his capabilities, independence, supervisory duties, or research functions in order to subvert the review of Bostick's position description by the Classification Office of the Library" (Pet. App. 43a).

The district court also rejected Bostick's contention that the failure to include him in the Library's "automatic promotion plan" was due to discrimination on the basis of race. The court found that the plan "was only available to employees in 'ladder positions'. Bostick, at grade GS-13, was already one step above the last run[g] generally available in his ladder. It is evident, therefore, that discrimination on the basis of race played no part in the exclusion of Bostick from the plan" (Pet. App. 44a).[2]

4. The court of appeals affirmed. It agreed with the district court that statistical evidence regarding black employees of the Library generally was "inconclusive" (Pet. App. 50a). But the court concluded that, assuming petitioner Bostick made out a prima facie case of discrimination, that case "was rebutted by the Library" and that Bostick "failed to show that the non-discriminatory reasons given by that agency constituted a pretext for discrimination" (Pet. App. 51a).

First the court of appeals noted petitioner's concession that "the Civil Service classification series for visual information specialists on its face covers only grades through GS-12" and observed as well that the Civil Service Commission,[3] which had "responsibility for establishing standards for placing positions in their proper classes and grades," had "evaluated [petitioner Bostick's] position and found that there was no basis for classifying it above GS-

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[2]In its final opinion in this case, the district court also refused to reconsider the class certification question, repeating its finding that petitioner Bostick "occupied a unique position at the Library, and that the issues raised by his reclassification request are not typical of the class members he sought to represent" (Pet. App. 27a n.1).

[3]Now the Office of Personnel Management.

13" (Pet. App. 48a).[4] The court concluded that although the Library may not have been bound as a matter of law to accept the Commission's ruling, the record in this case revealed no factual justification for the Library to depart from that ruling (Pet. App. 48a-49a).

The court of appeals also rejected petitioner Bostick's contention that the classification reason given for the failure to promote him was pretextual because he performed the same kind of work as white employees classified at the GS-15 level. Petitioner, the court pointed out, "is a high school graduate working in the relatively non-professional field of a visual information specialist" who is " 'rarely, if ever, called upon to do economic, social, scientific or other forms of subject discipline analysis' " (Pet. App. 49a & n.13). The employees with whom he sought to be compared, on the other hand, "usually have graduate degrees" and are "frequently among the top experts in academic research submitted to the Congress on public policy matters" (Pet. App. 50a).

Finally, the court of appeals declined to disturb the district court's ruling on the class action question, finding that "[t]he fact situations involving these individuals are relatively unique and not typical of any class and there is no basis for overturning the exercise of the District Court's discretion in failing to make a class certification" (Pet. App. 45a-46a n.1; citations omitted).[5]

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[4]As noted above (see page 2, *supra*), the Library nevertheless had reclassified petitioner Bostick's position at the GS-13 level in view of his personal strengths in the position.

[5]The individual action involving Joslyn N. Williams is now pending on the government's appeal from a finding of discrimination. *Joslyn N. Williams* v. *Boorstin*, No. 79-1684 (D.C. Cir. filed June 4, 1979).

ARGUMENT

The result reached by the court of appeals is correct and involves only the application of settled principles to the particular facts of this case. Further review by this Court is not warranted.

1. The district court found that petitioner Bostick had not proven that the Library's refusal to reclassify his position was due to racial discrimination in violation of Title VII. The court of appeals held that this finding was not clearly erroneous. Under the Court's well-settled rule, when two courts have reached the same conclusion on a question of fact, their findings should be accepted as final "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949); see also *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967). No such showing has been made here.

There is no merit to petitioners' argument (Pet. 19-22) that the courts below "misconstrued the nature and function of statistical evidence and improperly applied [their] conclusions to the facts presented by the experts." The court of appeals simply recognized that "the usefulness of statistical evidence depends on all the surrounding facts and circumstances" (Pet. App. 51a n.17).

Petitioner Bostick's expert witness concluded, on the basis of statistical analysis, that there was a disparity in pay of black and non-black employees of the Library of Congress and that this disparity amounted to three or four million dollars per year for the years 1974-1976 (Pet. App. 38a). The government did not dispute these statistics as to pay standing alone, but did introduce the report and testimony of another statistical expert to demonstrate that Bostick's evidence was unrelated to the Library's failure to

promote him. The government's expert witness, unlike Bostick's witness, considered whether there was a disparity in the frequency with which black and white employees were *promoted*, and he considered separately employees hired before and after the effective date of the application of Title VII to federal employees (*ibid.*).

The data compiled by the government's expert indicated that for the years 1974-1976, there was no disparity in the promotion rate of blacks and non-blacks. The government's expert also testified that the differences occurring in annual salary and grade level for the most part resulted from large differences between black and non-black employees with greater tenure—those hired before 1972—and that no differences in salary and grade levels remained by 1976 that could not be explained on racially neutral grounds. Thus, the expert concluded that the "most recent data available for salary and grade indicates that no disparity can be attributed to race" (Pet. App. 39a). After considering the testimony of Bostick's expert witness and the government's expert witness, the district court found that "the evidence of disparate treatment of minority employees at the Library inferable from [the former], when viewed in the perspective of [the latter], does not sustain [petitioner Bostick's] burden of proving that there was racial discrimination at the Library in 1972 affecting [Bostick]" (*ibid.*).

In any event, because petitioner Bostick was the only employee in the particular classification series in the Congressional Research Service of the Library of Congress and his position was classified at a level *above* the full performance level for a visual information specialist, the court concluded that the statistical evidence "provided little guidance to the Court in deciding whether discrimination entered into the particular decisions which

affected Bostick" (Pet. App. 42a). The court of appeals similarly found the statistical evidence to be "inconclusive," noting that only the government's expert had focused on disparities in promotion (Pet. App. 50a-51a & n.16).

Moreover, both courts below found that, even assuming the statistical evidence was sufficient to establish a prima facie showing of racial discrimination, the Library had successfully rebutted the inference of discrimination by establishing that its refusal to reclassify Bostick's job at the GS-15 level was attributable to Civil Service Commission constraints (Pet. App. 42a-43a, 49a n.11, 50a-51a & n.17). The court of appeals properly observed that it need not decide whether distinctions between experts in graphics and those in such fields as economics, sociology, and other academic pursuits "are appropriate as a matter of personnel policy," because "such distinctions cannot be regarded as racially discriminatory" (Pet. App. 50a n.14).

Finally, there is no merit to petitioners' claim that there was "voluminous, uncontradicted evidence of class-wide discrimination at the Library" which would require the courts below to grant class relief even though this is not a class action (Pet. 14; see Pet. 8-10). The lower courts did not make any such findings, and petitioners have not cited any evidence to support their claim.[6]

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[6]Similarly, there is no basis for petitioners' charge that the Library refuses to "comply with minimum federal affirmative action standards" (Pet. 15 n.1). On the contrary, the district court noted that "Dr. Eugene Walton, the Library's Assistant Director of Personnel for Equality Programs testified at trial with some pride about the Library's affirmative action program, for which he has primary responsibility" (Pet. App. 40a).

2. The court of appeals correctly refused to overturn the district court's exercise of its discretion[7] in refusing to certify a class represented by Williams and petitioner Bostick. The district court found that their claims or defenses were not "typical of the claims or defenses of the class," as required by Fed. R. Civ. P. 23(a)(3). See Pet. App. 2a-5a, 27a n.1.[8]

Whether the claims of the representatives are "typical" of those of the members of the class generally is a matter of degree and, accordingly, requires the exercise of judgment by the district court in comparing the claims of the representatives with those of the other class members to determine whether, on balance, the case should proceed as a class action. *Taylor* v. *Safeway Stores, Inc.*, 524 F. 2d 263, 270 (10th Cir. 1975); *Wright* v. *Stone Container Corp.*, 524 F. 2d 1058, 1061-1062 (8th Cir. 1975). Thus,

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[7]See, *e.g.*, *DeGrace* v. *Rumsfeld*, 614 F. 2d 796, 809 n.12 (1st Cir. 1980); *Scott* v. *University of Delaware*, 601 F. 2d 76, 84 n.14 (3d Cir. 1979).

[8]In its initial decision on the class action issue, the district court had also concluded that the instant case did not satisfy the requirement in Fed. R. Civ. P. 23(b)(3) that a class action be "superior to other available methods for the fair and efficient adjudication of the controversy" (see Pet. App. 5a-6a). The district court based this conclusion on the availability of administrative procedures to remedy racial discrimination in the federal government, finding that this alternative avenue of relief rendered "the need for class action adjudication * * * less apparent than in instances in which title VII alone is in the picture," as in the private sector (Pet. App. 6a).

Although petitioners devote some attention to this issue (Pet. 12-14), we note that the district court did not rely on the "superior method" requirement in Rule 23(b)(3) when it rendered its final decision refusing to reconsider the class action issue (Pet. App. 27a n.1), and that the court of appeals likewise did not rely on Rule 23(b)(3) in affirming the district court's refusal to certify a class (Pet. App. 45a-46a n.1). We, too, do not rely on Rule 23(b)(3).

Rule 23(a)(3) is properly used by a district court "to screen out class actions when the legal or factual position of the representatives is markedly different from that of other members of the class even though common issues of law or fact are raised." C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 1764, at 614 (1972). See, *e.g.*, *Koos* v. *First National Bank of Peoria*, 496 F. 2d 1162, 1164-1165 (7th Cir. 1974) ("[w]here it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative"); cf. *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 403 (1977), quoting *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974) (class representative must " 'possess the same interest and suffer the same injury' " as class members); *DeGrace* v. *Rumsfeld*, 614 F. 2d 796, 809-811 (1st Cir. 1980); *Hill* v. *Western Electric Co.*, 596 F. 2d 99, 101-102 (4th Cir. 1979); *Chavez* v. *Tempe Union High School District No. 213*, 565 F. 2d 1087, 1094 n.10 (9th Cir. 1977). On the particular facts of this case, the district court did not abuse its discretion in concluding that the typicality requirement was not satisfied.

Williams, who along with petitioner Bostick sought to represent the class, was terminated from employment because of false statements made on his application for employment (Pet. App. 3a). He conceded that the statements in question were false, but contended that they were the result of racial discrimination because he had to demonstrate qualifications superior to those of white applicants in order to obtain a job (*id.* at 3a n.3). Plainly the claim based on these peculiar facts was not typical of the claims of black employees of the Library generally. For although the claim rested in part on allegations of discrimination against blacks, the district court

reasonably could conclude that a major focus of the litigation pertaining to Williams would be on whether a false statement on an employment application could be excused, even assuming a pattern of racial discrimination by the Library (see Pet. App. 4a, 45a-46a n.1).

Similarly, petitioner Bostick's claim was relatively unique. He occupied the only position of its type in the Congressional Research Service at the Library. But beyond this, he had a unique personal employment history at the Library, which included repeated (and twice successful) attempts to have his position reclassified, a number of official reviews of that classification by the Library and the Civil Service Commission, and the Library's recognition of the quality of his performance when it reclassified his position one level above the GS-12 maximum for visual information specialists generally. These factors made it likely that Bostick's own claim would turn on his personal work history, rather than alleged across-the-board discrimination by the Library and statistical evidence that may be relevant to such discrimination. And, indeed, the opinions of the district court and court of appeals in this case are devoted principally to the facts of petitioner Bostick's own experience at the Library.

Contrary to petitioners' contention (Pet. 11-12), the courts below did not announce a rule that the employment position of the class representative must be typical of that of each class member such that "virtually no class action could be maintained unless the named plaintiff's employment position mirrored that of the class members." To the contrary, both courts below made clear that it is the *claims* or *issues* raised by the representatives that must be typical (Pet. App. 3a-5a, 27a n.1, 45a-46a n.1)—precisely the rule petitioners urge (Pet. 11-12). Neither

court below suggested that a person holding one job with a particular employer cannot be a representative of a class that includes employees holding different jobs where a common personnel practice affects all the employees. Both courts simply determined that in the particular circumstances of this case, the typicality requirement had not been satisfied. This essentially fact-bound question does not warrant further review.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]We note also that the proposed class included all employees and applicants for employment with the Library after 1960—well before the 1972 effective date of the extension of Title VII to federal employment. There may also be questions regarding the propriety of Williams' and petitioner Bostick's representation of a class that includes applicants for employment. See, *e.g.*, *East Texas Motor Freight System, Inc.* v. *Rodriguez, supra.*

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